SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 350

J. WILLISON SMITH, JR. and ELIZABETH K. SMITH, His Wife,
Petitioners

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

and

PHILADELPHIA ELECTRIC COMPANY,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT, PENNSYLVANIA PUBLIC UTILITY COMMISSION, IN OPPOSITION

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JURISDICTION

Petitioner states that the federal question sought to be reviewed here is the sole and exclusive jurisdiction of the Federal Power Commission (FPC) "over

interstate high voltage electric transmission facilities".

Respondent, Pennsylvania Public Utility Commission (Pa. P.U.C.) does not deny such FPC jurisdiction over *existing* lines (facilities) transmitting bulk electricity in interstate commerce. But such line (facility) does not exist until it is ready and capable of such use. It does not exist until it exists. It does not exist until it is constructed. It cannot be constructed until a suitable right-of-way is procured. Such procurement is often feasible only by the exercise of the power of eminent domain. Such power to condemn land in Pennsylvania, in the subject circumstances (for transmission of electric power) is granted to certain corporations by the Act of May 8, 1889, P. L. 136, as amended, 15 P.S. §1182 (now 15 P.S. §3272), but the right cannot be exercised unless and until the Pa. P.U.C. has found that the proposed exercise "is necessary or proper for the service, accommodation, convenience or safety of the public". This fundamental requirement must be met regardless of whether the proposed line is expected to be used in interstate or intrastate transmission.

Thus, a line ready to transmit electricity is a "facility" therefor. But a pre-condemnation inquiry as to the necessity for condemnation is a far cry from a "facility" used for, or capable of transmitting electricity anywhere.

Petitioners would confuse the issue at hand (a pre-condemnation finding of necessity for condemning right-of-way for a proposed line) by repeatedly referring to an existing line ready and capable of transmitting electricity.

FPC does not have, has not claimed, and in fact has *dis*claimed jurisdiction to authorize such type of condemnation. It is the petitioners who contend that FPC *should* claim jurisdiction, and the claim of federal involvement is the claim of petitioners alone.

QUESTION PRESENTED

Whether the Supreme Court of Pennsylvania acted correctly in affirming the decree of the Court of Common Pleas of Dauphin County (sitting as Commonwealth Court) holding that the Federal Power Commission had no jurisdiction in the matter (authorizing the exercise of the power of eminent domain granted under state law, to obtain right-of-way for electric transmission line) and that the Pennsylvania Public Utility Commission has such jurisdiction?

STATEMENT

Respondent believes that it is of the utmost importance to bear in mind that the matter here in issue is NOT the transmission line *now* in existence and traversing petitioners' land, but rather a *pre-condemnation* application proceeding filed with the Pennsylvania Public Utility Commission (Pa. P.U.C.) by Philadelphia Electric Company on April 4, 1965, and docketed A. 92227.

The line *now constructed* may be the subject of regulation by the Federal Power Commission (FPC). But that is not the issue here. The application proceeding filed with and processed by Pa. P.U.C. was essentially an in rem, eminent domain proceeding, over which the FPC does not have and has not claimed jurisdiction. In fact the FPC has *dis*claimed jurisdiction to authorize such condemnation.

The following history is pertinent:

(a) On April 4, 1965, Philadelphia Electric Company (hereinafter, PE) filed its application, docketed A. 92227, with the Pennsylvania Public Utility Commission (hereinafter, Commission), for a finding of necessity for its proposed 500 KV electric tower line across the property of Smiths, petitioners herein. The Commission scheduled hearing for June 25, 1965.

(b) On June 23, 1965, Smiths filed their complaint in the Court of Common Pleas of Dauphin

County (sitting as Commonwealth Court) seeking a preliminary and final injunction enjoining construction of the line across the Smith property, and enjoining the Commission from proceeding further with the application pending before it.

(c) On June 24, 1965, Commonwealth Court, after hearing and argument, denied the requested preliminary injunction.

(d) On August 9, 1965, the Commission by order reported in 42 Pa. P.U.C. 379, denied Smiths' motion to dismiss the Application for lack of jurisdiction in the Commission and for lack of authority in the electric company to condemn in this case.

(e) On March 21, 1966, Commonwealth Court, after hearing and argument, issued its adjudication and order nisi, reported in 85 Dauphin 106, upholding the jurisdiction and authority of the Commission. Smiths filed exceptions thereto.

(f) On March 28, 1966, the Commission approved PE's application docketed A. 92227. This approval was granted over Smiths' objections that the Commission lacked jurisdiction of the subject matter, and that the applicant was unlawfully seeking to condemn for an improper purpose. Smiths appealed the order to the Pennsylvania Superior Court at No. 30 March Term, 1967, and the appeal was listed for argument at the session commencing June 13, 1966, at Philadelphia.

(g) Upon request, the Superior Court granted continuance to the session commencing December 12, 1966.

(h) On November 22, 1966, the Superior Court denied a request for a further continuance.

(i) On December 12, 1966, Smiths withdrew and discontinued their appeal at No. 30 March Term, 1967. See (f) above. It will be noted that although Smiths withdrew and discontinued that appeal, they now make averments (Pet., p. 21) unsupported by any record here.

(j) On December 27, 1966, Commonwealth Court dismissed Smiths' exceptions and affirmed and adopted the chancellor's findings, conclusions, and decree, referred to in paragraph (e) hereinabove.

The appeal from that decree to the Supreme Court of Pennsylvania, which affirmed the decree, is the basis of the present petition.

It is to be noted that this decision of the Supreme Court of Pennsylvania not only affirmed the Dauphin County Court in the Smith case, but the Superior Court of Pennsylvania and the Commission in *Charles S. Dunk and Bella M. Dunk v. Pennsylvania Public Utility Commission and Philadelphia Electric Company* where the same issues of state versus federal jurisdiction were presented. *Dunk* is reported at 210 Pa. Superior Ct. 183, 232 A. (2) 231 (1967). Both cases were combined for argument and the Supreme Court of Pennsylvania affirmed the dispositions of the courts below both on the FPC issue and on all other issues in upholding Philadelphia Electric's right of condemnation in this case.

ARGUMENT

The petition for certiorari should not be granted for the following reasons:

1. Petitioners have not requested a stay because the electric transmission line which was proposed has been constructed by, lawful entry upon petitioners' land condemned by the electric company, leaving condemnees to their right to damages. The condemnation being unstayed, and the line having been constructed and placed in use, petitioners' case is moot.

2. Eminent Domain has traditionally been a local matter, controlled by the states, and Congress has invaded the area with great reluctance and only in the most compelling circumstances. Such invasion should never be implied. The Federal Power Act contains no provision for condemning property required for a transmission line such as is here involved because Congress recognized the adequacy of state laws for that purpose. This is true regardless of whether the line is for intrastate or interstate transmission.

3. Petitioners have not presented any new and substantial federal question. The absence of a substantial federal question here is strongly indicated by the fact that petitioners have been unable (or they have been unwilling to attempt) to convince the Federal Power Commission that any federal question is involved here.

Petitioners urge (1) that regulation of the *existing line* is a matter in the exclusive competence of FPC; and (2) that the pre-condemnation application proceeding filed with Pa. P.U.C. involved land (right-of-way) required for the construction of an electric transmission line which may be used for the interstate transmission of electricity, and (3) that the cost of such land, being a matter which would ultimately be reflected in the cost of electricity to be transmitted over it, is also a matter over which the FPC should have (and does have) exclusive jurisdiction.

Whether the transmission line *which now exists* is a "facility" in the exclusive competence of the FPC is a matter entirely separate from the issue involved in this *eminent domain* proceeding.

Historically, the reluctance of the federal government to intrude upon the states' laws and procedures for condemning land within their borders is amply reflected in the development of Rule 71A of the Federal Rules of Civil Procedure, 28 U.S.C.A., governing condemnation of property.

> "In the early days of our history to avoid the fears concerning the national government, Congress relied on *purchase, cessation from state* governments, or condemnation in a *state* court and by authority of a *state* statute for the acquisition of lands outside the District of Columbia."

This was for acquisitions by or on behalf of *the United States itself.* This attitude is reflected in Title 74 of Purdon's Pennsylvania Statutes Anno-

tated, Sections 1 et seq., and especially Section 17, reading:

> "§17. Condemnation Proceedings.
>
> In case the United States shall decide to resort to condemnation in acquiring land for the purposes specified in the first and second sections of this act [to improve navigation facilities] the United States shall, in all respects, be governed by the laws of this state regulating the appropriation of private property for public use, and said laws are hereby made applicable: . . ."

Under the present *Federal Power Act*, Title I (concerning *navigable waters*), 16 U.S.C. §814, it is provided:

> "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a *waterway or waterways* for the use or benefit of interstate or foreign commerce, it *may* acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the

United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the *State* where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 10, 1920, c. 285, §21, 41 Stat. 1074." (Emphasis added).

It will be noted (1) that such license concerns "waterways"; (2) that the federal power to condemn "may" be exercised, if necessary; and (3) that "The practice and procedure in any action or proceeding for that purpose . . . shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated".

The practice and procedure in Pennsylvania is governed by the *"Eminent Domain Code"*, Title 26 Purdon's Pennsylvania Statutes Annotated.

The power of eminent domain provided under Part I of the Federal Power Act was evolved in order that the needed improvement of navigable waterways be not impeded by either the statutory action or statutory inaction of the states. Where such *waterways* are concerned the FPC may prosecute anyone acting without a federally required license.[1] It may seek a restraining order and restoration of the status quo.[2]

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[1] 16 U.S.C.A. §817.

[2] *U. S. v. Appalachian Electric Power Co.*, D.C. Va., 1938, 23 F. Supp. 83, reversed on other grounds, 61 S. Ct. 291, 311 U.S. 377, 85 L. Ed. 243, rehearing denied 61 S. Ct. 548, 312 U.S. 712, 85 L. Ed. 1143, petition denied 63 S. Ct. 67, 317 U.S. 594, 97 L. Ed. 487.

It may order a violator to apply for a federal license. And it has done all of these things.

A licensee under Part I of the Federal Power Act, if qualified to condemn land under both the state and federal law, *may proceed to do so under either one.* If there is no state law, or if it is inadequate to the purpose, or if it is obstructive, the federal power to condemn will remove the impediment by superseding it.[3] But if the power granted by the state is adequate to the purpose, and permits the acquisition of an estate equal or superior to that obtainable under federal law, then there is no requirement that the condemnor must resort to the federal power to condemn. *Alabama Power Co. v. Gulf Power Co.*, D.C. Ala., 1922, 283 F. 606 (1922); *Superintendent of Public Works v. Paonesso*, 1958, 182 N.Y.S. 2d 223, 14 Misc. 2d 787.

So much for the power to condemn provided under Part I of the Federal Power Act. *No other power to condemn is provided for any other purpose or under any other portion of the Act.*

Section 824(a) and (b) under Part II of the Federal Power Act (16 U.S.C.A. §824), gives the FPC the power to regulate the *transmission* and *sale* of electric energy *being transmitted and sold* at wholesale in interstate commerce. Obviously, there can be no such transmission and sale until there are *existing facilities therefor.* When the FPC asserts jurisdiction over such transmission and sale it may then "ascertain" the "actual" cost of the property in-

[3] *Alabama Power*, infra; *Superintendent of Public Works v. Paonesso*, infra.

volved, and other elements entering into the rate-making process (16 U.S.C. §824g). But "actual" cost cannot be "ascertained" until it has become *actual.* Nor does the mere fact that a particular pre-production cost will ultimately affect the cost to the ultimate consumer thereby give the FPC the power to *dictate* what such cost *shall be,* rather than to *ascertain* what it *was.* Such *pre*-production cost is not a "facility" for the transmission or sale of electric energy anywhere. Petitioners would ignore the express limitations of the Federal Power Act. But in *Addison v. Holly Hill Fruit Producers, Inc.,* cited by petitioners, the Court (per Mr. Justice Frankfurter) said, 64 Supreme Court 1215, at page 1221, "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. *But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.*" (Emphasis supplied).

Connecticut Light and Power, cited by petitioners, was a case in which the FPC *asserted* jurisdiction, and it concerned accounting practices involved in the transmission and sale of electric energy over *existing* facilities. Yet the Court pertinently observed (65 Supreme Court 749, at 756) [Technologically]:

> "Every facility from generator to the appliance for consumption may thus be called one for transmitting such interstate power. By this test the cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state."

But the Court did not find such test persuasive. If this apt comment may be made of a toaster which is *plugged in* to an *existing* system, what may be said of a toaster that not only is not plugged in but is nothing more than a drawing in the blueprint stage?

In *Clemmer v. Pennsylvania Public Utility Commission,* cited by petitioners, the Court affirmed the very powers which petitioners here would seek to negate.

In all the remaining cases cited by petitioners the Federal Power Commission was a party, either plaintiff or defendant. In the *Scenic Hudson* case the FPC had granted a license for the construction of *a hydroelectric project affecting navigable waters* (a matter over which the FPC had unquestioned jurisdiction to issue such a license). The Court held that the license was improvidently issued, and remanded the matter for further consideration. But in the instant case the FPC has not seen fit to become a party. And in a case similar to the instant case (non-hydroelectric), the FPC *disclaimed jurisdiction to issue such a license: Pacific Power & Light Co. v. Federal Power Commission,* C.A., 1950, 184 F. 2d 272, 87 U.S. App., D.C. 261 (1950).

In the cases cited by petitioners the FPC was concerned with accounting practices involved in the actual transmission and sale of electric energy over *existing facilities therefor.*

Clearly, Congress has not authorized the issuance of a license to condemn property under Part II of the Federal Power Act, but it has authorized the FPC to regulate the sale of energy transmitted over inter-

state lines. Congress must have realized that the lines necessary for such transmission were being constructed *without any necessity for additional power to condemn.*

> "[The] purpose and scope [of the Federal Power Act] is fairly stated, though in general terms, in the title:
>
> 'An act to create a federal power commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.' "

Alabama Power Co. v. Gulf Power Co., supra.

Keeping these purposes clearly in mind, Part I of the act provides for the issuance of licenses and the power to condemn land to protect and promote the use of navigable waters for navigation and for hydroelectric power production, based, naturally, upon the importance of *waterways*, and the *nature* of water (involving multi-state flooding or flow-through). For these reasons, the *augmentive* power to condemn land is provided in Part I of the Federal Power Act, to protect and enhance *waterways*. There is no comparable provision under any other part of the Act. Even under Part I of the Act, the power of condemnation provided under state law is preserved to the fullest, consistent with the federal purpose. The state law is not unconditionally ousted. *Alabama Power Co. v. Gulf Power Co.*, supra; *Superintendent of Public Works v. Paonesso*, supra.

Though the Federal Power Act has long been in effect, petitioners have been unable to cite a single case suggesting that any federal authority is either necessary or available for the right to condemn land for an electric transmission line such as is here involved. On the contrary, even where (as under Part I) such right is provided, the intention is clear that *state* practices and procedures shall continue to control.

A strong analogy is presented by the fact that, under the Pennsylvania Public Utility Law, Title 66 of Purdon's Pennsylvania Statutes Annotated, the Pennsylvania Public Utility Commission is given (66 P.S. §§1179 to 1181) exclusive authority to condemn land required for rail-highway crossing facilities which *usually carry trains in interstate commerce,* yet no one has ever contended that such power is superseded by federal law.

Petitioners protest that others will share in the proposed "pooling benefits" and that their constitutional rights are violated. These objections are thoroughly answered in *Alabama Power Co.,* supra.

The contention that the rule of strict construction should bar the condemnor's right here was similarly raised and answered in *Toler v. Pa. P.U.C.,* 185 Pa. Superior Ct. 222, 228 (1958), where the Court said:

> "Appellants first contend that a statute conferring the right of eminent domain on a private corporation should be strictly construed. Appellees agree with this proposition, and we are satisfied that it sets forth a well-settled rule of construction in Pennsylvania. See Section 58 of the

Statutory Construction Act of 1937, P. L. 1019, 46 P.S. 558; Lance's Appeal, 55 Pa. 16; Pagni v. Commonwealth, 179 Pa. Superior Ct. 213, 116 A. 2d 294. However, the judicial interpretation of the term 'public use' in our state has not been circumscribed by mere legalistic formulas or philological standards: Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 200 A. 834.[3] The Act of 1921 provides for the appropriation of property necessary for the Company's corporate use. . . .

"Rarely, if ever, will a taking upheld by the state court be disturbed by the Supreme Court." Vol. 7, *Moores Fed. Practice*, p. 2714.

Petitioners' contention that since the cost of the land to be condemned will affect the ultimate rate to the consumer the FPC should regulate such land acquisition, is pointedly answered as follows in *Grand River Dam Authority v. Grand-Hydro*, Okla. 1948, 69 S. Ct. 114, 335 U.S. 359, 93 L. Ed. 64, rehearing denied 69 S. Ct. 298, 335 U.S. 900, 93 L. Ed. 435:

"It *may* be that, at some *later* date when the petitioner, as a federal licensee, shall be ready to *sell* power, the Commission or other appropriate body will *then* give consideration to *the value to be allowed for this land in the petitioner's*

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[3] And see Ohio Power Co. v. Deist, 154 Ohio St. 473, 96 N.E. 2d 771, wherein it was held that the construction of a statute delegating authority to exercise the right of eminent domain must not be so strict as to be unreasonable or stained."

rate base. There is, however, *nothing* in the Federal Power Act that purports to prescribe *the price which a purchaser of land may pay voluntarily and in good faith for land which it later incorporates into a project,* . . .

* * * * * * *

As to the question whether the Federal Power Act should be interpreted as *actually superseding the state law of condemnation and as restricting the measure of valuation* which lawfully may be used by the courts of Oklahoma in a condemnation action for the acquisition of land for power site purposes by an agency of that State, there is *nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws.*" (Emphasis added.)

"There also has been a suggestion made of the possible materiality in this case of those provisions of the Federal Power Act which relate to the price to be paid by the United States in the event that it takes over the project of a licensee upon or after the expiration of a federal license. The issues raised by that suggestion are comparable to those just discussed in relation to the rate base of a federal project, except that such a recapture of the project is even more remote than the determination of a rate base for the computation of rates to be charged for its product. We accordingly express no opinion upon the issues which may arise when, as and if the above-mentioned proceedings may be taken."

Four justices joined in a dissent based solely on the objection that the condemnee was permitted to recover the value of *running water power,—an element completely absent from the instant case.*

As already observed in *Superintendent of Public Works v. Paonesso,* supra, a licensee is free to use its state power of eminent domain, unless the federal control of navigability and water power is prejudiced thereby.

In the instant case there is no intimation whatsoever of any prejudicial effect upon navigability or water power. Accordingly, the FPC has made no attempt to claim any involvement in the case. Neither is there any suggestion that the right-of-way here obtained is any interference with any federal plan. If anything, the contrary appears.

CONCLUSION

The decision below is correct, and no question warranting further review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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